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nothing but a group of individuals carrying on a collective life by means of mental interaction and this process is conditioned upon a coördination of individual activities; this coördination is the fundamental fact for the sociologist. Mr. Ellwood very properly recognizes the existence of most intimate relations between sociology and political science, since the state is not only the most imposing social structure and the "most visible manifestation of social organization but also the highest form of human association."

For the political scientist Professor Ellwood's chapters on the origin and nature of society, forms of association and the theory of social forces and of social order have a more direct interest than the rest of his treatise. The problem of the origin of society, he says, is fundamentally a biological question but in its nature society is an "intellectual construction." The three greatest "historical" theories of the nature of society he conceives to be the contract theory, the organic theory and the psychological theory. The latter when rightly understood offers the only "adequate basis for a true synthesis for the opposing contract and organic theories." The psychological theory holds that the unity of the social life is that of a psychological process and is, in Mr. Ellwood's opinion, the correct interpretation of the nature of society, which, as stated above, is a group of persons acting collectively by means of mental interactions.

Altogether Mr. Ellwood's interpretation of the origin and nature of society and of the social processes, which is that of the psychologist rather than the political scientist, is characterized by extraordinary keenness of insight, originality and depth of understanding. No one has so well presented this theory and his book will do much to clear up some of our notions regarding one of the most difficult questions of political science.

The Power of the Federal Judiciary Over Legislation. By J. HAMPDEN DOUGHERTY. (New York: Putnams, 1912. Pp. 125.)

The Supreme Court and the Constitution. By CHARLES A. BEARD. (New York: The Macmillan Company, 1912. Pp. vii, 127.)

Mr. Dougherty revives the thesis advanced by Brinton Coxe in his *Judicial Power and Unconstitutional Legislation* that the federal courts were given, by explicit provision of the Constitution inserted for the

purpose, the power to pass upon the constitutionality of acts of congress. The provision instanced is the one brought forward by Marshall—though not very confidently—in *Marbury vs. Madison*, extending the judicial power of the United States to all cases “arising under this Constitution.” But this clause was explained by both Madison and Hamilton in the *Federalist* as signifying merely cases arising in consequence of state laws transgressing prohibitions of the Constitution upon state legislative power. No doubt the bestowal of this jurisdiction upon the national courts, in conjunction with the duty thrust upon the state courts by Article VI, sec. 2, materially furthered the establishment of judicial control of legislative power generally and so of judicial control of congressional power. But this fact it is obvious lends no support to Mr. Dougherty’s argument, which is based upon the text of the Constitution.

Mr. Beard pursues a different line of argument. Reviewing certain acts and utterances of twenty-eight members of the Convention before, after, or during it, he finds, he thinks, twenty-five of these to have been favorable at one time or other to a power in courts to pass upon the validity of acts of coördinate legislatures under the written constitution, and only three to have been unfavorable. From this assemblage of data he appears to conclude that the supervisory power of the national courts over the acts of congress was bestowed, not indeed by any clause inserted in the Constitution specifically for the purpose, but implicitly as an item of judicial power as it was then understood; and he repels with vigor the charge that the decision in *Marbury vs. Madison* comprised an act of judicial usurpation.

The idea that *Marbury vs. Madison* was an act of usurpation may be dismissed without hesitation. The only justification for it at any time was the false idea of the nature of judicial decisions which the courts have themselves taught. On the other hand I am not convinced by Mr. Beard’s data that the convention of 1787 thought itself to be concluding the constitutional question decided in *Marbury vs. Madison*. On the contrary I believe that the Convention regarded that question as still as open one when it adjourned.

Thus of the twenty-five members set down by Mr. Beard as favoring judicial review of acts of congress seven are so classified simply on the score of their voting two years after the Convention for the judiciary act of 1789, the terms of which do not necessarily assume any such power, though they do not preclude it. Of another six, only utterances are quoted which postdate the Convention, sometimes by several years.

Furthermore by far the two most important members of this group are Hamilton and Madison, the former of whom apparently became a convert to the idea under discussion between the time of writing *Federalist* 33 and *Federalist* 78 and the latter of whom is proved by the very language which Mr. Beard quotes to have been unfavorable both in 1788 and 1789. Again, another four are reckoned as favoring the power of judicial review proper on account of judicial utterances antedating the Convention from five to seven years, though these utterances, at the time they were made, were in one instance sharply challenged by public opinion and in the other by judicial opinion. Only eight of the twenty-five acknowledged the power on the floor of the Convention itself, and of these eight three were pretty clearly recent converts to the idea, while some of them seemed to limit the power to its use as a means of self-defense by the court against legislative encroachment. On the other hand the idea was challenged by four members of the Convention; and although they were outnumbered, so far as the available record shows, two to one by the avowed advocates of judicial review, yet popular discussion previous to the Convention had shown their point of view to have too formidable backing to admit of its being crassly overridden. Despite therefore the sharp issue made in the Convention, not a word designed to put the view of the majority beyond the same contingencies of interpretation to which it was at the moment exposed in the state constitutions was inserted in the national Constitution, though on the other hand nothing to nullify the manifest hopes of the majority was inserted either.

And these hopes, it must be conceded, had pretty solid ground to rest upon. The written constitution from the outset was regarded as fundamental law and as ordained by the people. The people however, once government was established, became by the political theory of the day the legislature, which thus had the right, not of course to set aside the Constitution—for nobody asserted that—but to interpret it. Indeed even of its own enactments the legislature was under many, if not all, of the state constitutions the final interpreter when it willed so to act. But the state legislatures had by 1787 got in bad odor. The demand of the day was for methods to check legislative power. In response to this demand the executive veto was created, prohibitions upon State legislative powers enforceable by the state and national judiciaries were inserted in the national Constitution, and lastly a construction put upon the current doctrine of the separation of powers which left the interpretation of laws exclusively with the courts. The result of this last-named

development was, on the one hand, the establishment of judicial review and, on the other hand, the reduction of the legislature from its earlier position of constitutional sovereign to that of "mere agent of the people." In this connection attention should be given Hamilton's assertion in *Federalist* 78, that it was "more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature" than that the latter should be final judge of its own powers. As a deduction from American constitutional history anterior to 1787 this contention is without merit but as expressive of the practical considerations that explain the *why* of judicial review—as contrasted with the *how*—the mere legal formula—it is extremely significant. A growing popular sentiment was disgusted with legislatures and wanted to check them and to that end was willing to make the courts paramount. In *Cooper vs. Telfair*, decided in 1800, Justice Chase reluctantly admits that it is the pretty unanimous opinion of bench and bar that the courts are the final interpreters of the Constitution. The response to the Virginia and Kentucky resolutions of 1798–99 had already shown this and the debate on the judiciary act of 1802 afforded further evidence to the same effect. Next year Marshall decided *Marbury vs. Madison*. Unless judges, in fear of enlarging their powers are required to take a view of the law, on a point not yet determined, counter to overwhelming popular opinion, that decision cannot be called "usurpation."

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